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No. 09-353

Supreme Court, U.S.
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In The
Supreme Court of the United States

HAL MERRITT,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts properly dismissed Petitioner's hostile work environment claim.

2. Whether the lower courts properly granted summary judgment in favor of United Parcel Service regarding Petitioner's race discrimination claims brought pursuant to Title VII and 42 U.S.C. § 1981 claim.

3. Whether the lower courts properly granted summary judgment in favor of United Parcel Service regarding Petitioner's age discrimination claim.

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STATEMENT OF THE CASE

Simply stated, this is a case about a management employee who *deliberately* violated UPS' corporate policies on integrity and proper employee conduct, and later manufactured claims of race and age discrimination when UPS terminated him consistent with its policies. Petitioner has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Fifth Circuit's April 16, 2009 Opinion is in conflict with a decision of this Court or any other Court of Appeals or that the Fifth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Therefore, the Petition should be denied.

I. PETITIONER'S EMPLOYMENT HISTORY.

UPS is a world-wide package delivery company and a provider of specialized transportation and logistics services. 1:258.[1] Hal Merritt was hired by UPS in March, 1977 to work as a part-time package unloader at its Jackson, Mississippi facility. 1:257. Merritt became a full-time employee in 1978. 1:259-60. Throughout his employment with UPS, Merritt was an at-will employee. 1:259.

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[1] The record on appeal contains two volumes of docketed pleadings. In this brief, record pages are cited as volume:page.

Merritt transferred to UPS' Gulfport, Mississippi facility in the early 1980s. 1:264. On May 5, 1986, he was promoted to a preload supervisor position and eventually became an on-road supervisor. 1:263-64. After working in several different management positions[2] and at other UPS facilities[3] throughout the country, Merritt returned to UPS' Gulfport Center as an on-road supervisor. 1:269-71. As the on-road supervisor, Merritt was responsible for training the service providers (drivers) on how to deliver a package from the service center to a customer. 1:263. In this capacity, Merritt also advised the service providers on how to track and code their packages. 1:263-64. Merritt worked in this position until his employment was terminated. 1:271.

II. PETITIONER'S TERMINATION.

On August 14, 2004, Merritt was disciplined and ultimately discharged because he personally falsified Company records and instructed drivers in the Gulfport Center (which he supervised) to falsify their delivery records. 1:298.

Prior to Merritt's termination, UPS, through its Regional Security Manager Bob Pritt ("Pritt"), conducted an

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[2] Merritt worked as a loss prevention manager, car wash supervisor, bench supervisor, Pascagoula, Mississippi Center Manager and as a supervisor trainer. 1:61-264, 268.

[3] Merritt also worked in Covington, Louisiana, Pascagoula, Mississippi, Atlanta, Georgia, Greensboro, North Carolina and Tampa, Florida. 1:265-68.

investigation at the Gulfport Center regarding employee concerns of "alleged falsification of missed packages being recorded as 'futures' and overtime pay being withheld from a preload employee." 1:299-301. The investigation occurred in July, 2004. *Id.* During this investigation, Pritt interviewed and obtained written statements from several service providers. *Id.* Nine (9) drivers indicated that Hal Merritt had routinely instructed them to code missed packages as "futures." *Id.*

During his deposition, Merritt admitted that he instructed service providers to record "missed"/"send-again" packages as "futures." 1:296. At the time, Steve Beattie ("Beattie") was the Gulfport Center Manager and Merritt's immediate supervisor. 1:297. Beattie never instructed Merritt "to tell the drivers to record 'missed' and 'send-again' packages as 'futures.'" *Id.*

Based on Pritt's investigation, it was clear that major service issues existed at the Gulfport Center. 1:314-16. On one occasion, Merritt instructed a driver to record on the delivery record that a customer had requested a late delivery on a package that actually had an early commit time. *Id.* An inquiry into the matter revealed that the customer had not made any such request; rather, the delivery was actually a service failure because the driver was late. *Id.*

Merritt continued his systematic practice of ethical and policy violations in a number of other similar episodes (verified by Pritt through employee statements, interviews and tracking sheets) which ultimately created an illusion of the Gulfport Center's efficiency

that was completely false. 1:314-16. After the investigation, Bob Pritt recommended Merritt's termination. *Id.*

III. PETITIONER'S VIOLATION OF UPS' POLICIES.

Integrity has always been essential to the way UPS does business. 1:317-18. UPS is guided by certain policies and principles which are outlined in the *UPS Policy Book* and the *UPS Code of Business Conduct*. *Id.*; *see also* 1:319-38. Both books are updated as necessary and distributed to all management personnel. 1:272-76.

Merritt's actions were a clear violation of UPS' policy on integrity. 1:292-93. Page 22 of the *UPS Code of Business Conduct* provides, in pertinent part:

> Most of us record or prepare some type of information during our workday, such as financial reports, accounting records, business plans, environmental reports, injury and accident reports, expense reports, and time cards. People inside and outside UPS depend on these reports to be accurate, truthful, and properly maintained. These people include employees, government representatives, auditors, and the communities in which we operate. **No one may deviate from our commitment to manage information accurately and truthfully.** (Emphasis added).

The *UPS Code of Business Conduct* and the *UPS Policy Book* insist that integrity is fundamental to the

Company's operations and expressly forbid falsification of Company documents. 1:331.

IV. THE EMPLOYEE DISPUTE RESOLUTION PROCESS.

A benefit offered by UPS to management and non-union employees is the freedom to participate in an internal Employee Dispute Resolution ("EDR") five-step program. 1:277. After his termination, Merritt elected to participate in this program. 1:278-82. Merritt went through the first four steps of the program, starting with his request to participate, a meeting with the Regional Employee Relations Manager, Martha Escandon (Hispanic female), a peer review and ending with mediation. *Id.* The peer review panel, which consists of three UPS employees – two selected by Merritt and one by UPS, unanimously agreed that Merritt's actions were wrong but voted to reinstate Merritt to his previous position. *Id.* However, because he acted without integrity, his peers agreed that he should not receive back pay, his annual stock distribution or his half-month bonus. *Id.* Further, they recommended that he be assigned to another facility. *Id.*

As stated in the EDR booklet, only the last step in the EDR program, arbitration, is binding. 1:339-48. After much consultation between the District H.R. Manager Gwen Lusk (African-American female), Regional H.R. Manager Diane Tait-Howard (African-American female) and Ms. Escandon, it was decided that in order to maintain consistency with the

integrity policies, Merritt's termination should be upheld. 1:349-51.

REASONS FOR DENYING THE PETITION

Petitioner provides absolutely no plausible factual or legal basis for this Petition. The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his stringent burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. This Petition is a colossal misuse of the Court's limited time and resources.

I. THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S HOSTILE WORK ENVIRONMENT CLAIM.

Petitioner failed to plead in his complaint and include in his Charge of Discrimination a hostile work environment claim. Petitioner's arguments regarding an "alleged" hostile work environment claim are legally irrelevant to this Court's consideration of the subject appeal as he never properly asserted a hostile work environment claim in this action. The Fifth Circuit Court of Appeals and the district court correctly determined that Hal Merritt failed to plead in his Complaint or assert in his EEOC Charge of Discrimination, a hostile work environment claim against UPS. *See* Pet. App. at 4-5.

Tellingly, in Petitioner's entire five (5) page argument regarding an alleged hostile work environment, he fails to tell the Court that his "alleged" hostile work environment claim was asserted for the *first time* in his Memorandum in Opposition to UPS' Motion for Summary Judgment. *See* Pet. at 4-8. Either Petitioner is confused as to what his action is about, or he is attempting to confuse this Court for purposes of creating an issue to support his baseless appeal.

It is well settled that a court may entertain a Title VII lawsuit *only* if the aggrieved party has (1) exhausted his or her administrative remedies, and (2) has filed suit within the time permitted after receiving a "notice of right to sue." *Taylor v. Books-A-Million,* 296 F.3d 376, 378-79 (5th Cir. 2002), *cert. denied,* 123 S.Ct. 1287 (2003). Indeed, exhaustion of administrative remedies is a prerequisite to filing suit under Title VII and the ADEA. *See Dollis v. Rubin,* 77 F.3d 777, 781 (5th Cir. 1995). Exhaustion occurs when a complainant timely files a charge of discrimination with the EEOC and receives a notice of right to sue. 42 U.S.C. §§ 2000e-5(e)(f); *see also Taylor,* 296 F.3d at 379. Courts should not condone lawsuits that exceed the scope of EEOC exhaustion. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264, 274 (5th Cir. 2008). EEOC complaints are broadly construed, but only in terms of the administrative EEOC investigation that "can reasonably be expected to grow out of the charge of discrimination." *Id., citing Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970). When a complaint alleges grievances not raised at the EEOC, those allegations must be dismissed. *See id.* at 274, *citing Pacheco v. Mineta*,

448 F.3d 783 (5th Cir. 2006).[4] This is the unambiguous law of the Fifth Circuit, which is in harmony with the law of this Court and all other Circuits.

A review of Merritt's Complaint clearly establishes that nowhere in Merritt's Complaint, which has never been amended, did he make a hostile work environment allegation. 1:11-16. In fact, even Merritt's Charge of Discrimination (by which he is bound for purposes of asserting a violation under Title VII) makes no reference to a hostile work environment claim. 1:352. In its Order, the district court correctly stated, and the Fifth Circuit agreed, that Merritt's "alleged" hostile work environment claim "was not adequately pled or included in the EEOC charge" 1:618. Based on the record evidence and established precedent, the Fifth Circuit correctly concluded that Merritt's only proffered evidence in support of his

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[4] *See also Johnson v. Pointe Coupee Parish Police Jury*, No. 06-31230, 2008 WL 64659 at *1 (5th Cir. 2008) (a plaintiff is precluded from alleging claims that were not included in his EEOC charge). In *Johnson*, plaintiff filed a complaint alleging discrimination under the ADEA and Title VII. *Id.* Although Johnson's EEOC charge alleged race discrimination, claims of age discrimination were never presented to the EEOC for adjudication. *Id.* at *2. Because the age claims were alleged in the federal complaint, defendant filed a motion for summary judgment arguing that plaintiff's allegations were procedurally improper because plaintiff circumvented the administrative process. *Id.* at *1. The Fifth Circuit found that a plaintiff who fails to allege an additional cause of action under an EEOC complaint is precluded from amending his complaint to include the claim, as such omission means that a plaintiff "failed to exhaust his administrative remedy." *Id.* at *2.

hostile work environment claim "[was] made at least three years before the filing of his EEOC charge for violations of Title VII, long after the statutory period for filing a charge."[5] *See* Pet. App. at 4. As such, this Court should give no further consideration to Merritt's Petition and deny the same.

II. THE LOWER COURTS PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UNITED PARCEL SERVICE REGARDING PETITIONER'S RACE DISCRIMINATION CLAIMS BROUGHT PURSUANT TO TITLE VII AND SECTION 1981.

A. Merritt Cannot Establish a *Prima Facie* Case of Race Discrimination Under Title VII or Section 1981.

In his Petition, Merritt "emphatically asserts" that his "termination was racially motivated." *See* Pet. at 10. However, the record is devoid of any evidentiary basis to support his claim that he was

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[5] *See* 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ."); *cf. Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002) ("It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory period. Provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile work environment claim may be considered by the court for the purposes of determining liability."). In this case, Petitioner had no "acts" that occurred within the filing period.

terminated "because of his race" and consequently, Merritt cannot establish a *prima facie* case of race discrimination.

Claims of racial discrimination brought pursuant to Title VII and Section 1981 are governed by the same evidentiary framework. *Harrington v. Harris*, 118 F.3d 359, 367 (5th Cir. 1997); *Marcantel v. State of Louisiana*, 37 F.3d 197, 198 n. 4 (5th Cir. 1994). To maintain a discrimination claim, a plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of racial discrimination. To meet this burden, plaintiff must prove: (1) he is a member of a protected group or class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class or that he was otherwise discharged because of his race. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 404 (5th Cir. 1999); *Fields v. J.C. Penney* Co., 968 F.2d 533, 536 n. 2 (5th Cir. 1992).

It is undisputed that Merritt, as an African-American, was a member of a protected class and was subjected to an adverse employment action when he was terminated by UPS. In viewing the facts in the light most favorable to Merritt, the district court accepted his argument that he was *qualified* for his position, "despite his admitted violations of the *UPS Policy Book* and the *UPS Code of Business Conduct*." 1:606. As such, the lower courts turned to the fourth and final element needed to establish a *prima facie* case of discrimination. *Id.* Based on the record evidence, the lower courts correctly concluded that

Merritt had failed to establish that others similarly situated were more favorably treated or that he was otherwise discharged because of his race. *Id.*; *see also* Pet. App. at 6.

1. Merritt's Inability to Proffer Any "Similarly Situated" Employees Who Were Retained Under "Nearly Identical" Circumstances Mandates the Dismissal of His Race Discrimination Claims.

Merritt asserts that others similarly situated, but not in his protected class (Caucasians), were more favorably treated or that he was otherwise discharged because of his race. Pet. at 10-11. The Fifth Circuit has "specifically addressed the plaintiff-employee's burden of proof in disparate treatment cases involving separate incidents of misconduct and has explained consistently that for employees to be similarly situated those employees' circumstances, including their misconduct, must have been 'nearly identical.'" *See Perez v. Texas Dep't of Crim. J.*, 395 F.3d 206, 213 (5th Cir. 2004). Otherwise stated, "[t]he plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances; that is, that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by other employees." *Okoye v. The Univ. of Tex. Houston Health Science Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001).

Furthermore, Fifth Circuit and the courts encompassed therein, routinely grant summary judgment for employers on discrimination claims where employees erroneously allege they were terminated for workplace infractions, but other employees outside of the protected class who engaged in the same acts were not. *See e.g., Bouie v. Equistar Chemicals LP*, 188 Fed. Appx. 233 (5th Cir. 2006) (affirming dismissal of race discrimination claim where plaintiff simultaneously committed two safety infractions and proffered white comparators were retained after committing one safety violation); *Trotter v. BPB America, Inc.*, 106 Fed. Appx. 272 (5th Cir. 2004) (affirming summary judgment for employer on plaintiff's Title VII race discrimination claim because plaintiff, who was terminated for physical confrontation with his supervisor, was not similarly situated to white employees who were retained after fighting co-workers); *Kelley v. Lockheed Martin Corp.*, 51 Fed. Appx. 483 (5th Cir. 2002) (affirming dismissal of plaintiff's Title VII racial discrimination claim because plaintiff, who was fired for being absent or tardy 49 times in a 2-year period, did not prove his white co-worker, who was absent 24 times in the same period, was similarly situated).

The basis of Merritt's race claim is that two Caucasian employees, Steve Beattie ("Beattie") and Donna Chennault ("Chennault") purportedly committed similar acts and were not terminated by UPS. Beattie and Chennault were not "similarly situated" to the Petitioner. The record clearly establishes that

the only reason that Beattie was disciplined (via suspension) as a result of the investigation is because UPS attributed some responsibility for Merritt's acts to him because as Center Manager "he should have been aware of the issues and problems in the center." 1:299-301. Chennault was issued a written warning because during the investigation, she stated that she became aware of Merritt's actions, but did not notify her manager. *Id.* In stark contrast to Merritt, the district court correctly opined that Beattie and Chennault were not accused of falsifying UPS documents or of instructing service providers to falsify UPS documents. 1:610. Furthermore, the district court stated that "their actions do not meet the definition of 'nearly identical' conduct as the Fifth Circuit has applied it." *Id.* Specifically, the district court concluded that "[t]he distinction between these two employees' conduct and Plaintiff's essentially amounted to inattentiveness or negligence on the part of Beattie, and inaction on the part of Chennault, as opposed to the undisputed affirmative acts of misconduct in which Plaintiff engaged." 1:609-10.

Moreover, the Fifth Circuit following its established precedent, properly determined that Merritt's discrimination claim failed as a matter of law because he was unable to proffer a "similarly situated" Caucasian employee who was retained under "nearly identical" circumstances. *See* Pet. App. at 6-7. Similarly, the Court should not be led astray by Merritt's "red herring" argument. Merritt's clear failure to identify a co-worker who was "similarly situated" but

retained under "nearly identical" circumstances is fatal to his race discrimination claims and contrary to the established precedent of this Court and its circuit courts. Based on the record evidence, Merritt's Petition should be dismissed.

2. Merritt's Reliance on the EEOC Determination Is Legally Misplaced.

Continuing in his baseless efforts to create an appealable issue, in his Petition, Merritt states that "[a]mazingly, the Defendant-Petitioner failed to articulate the findings of the Equal Employment Opportunity Commission in their Motion for Summary Judgment," as if UPS somehow attempted to hide a "smoking gun" by not mentioning the determination letter. *See* Pet. at 13.

As an initial matter, UPS did not refer to the EEOC Determination because it is legally irrelevant to a review of the district court's dismissal of Merritt's race discrimination claims. In *Cruz v. Aramak Services, Inc.*, 213 Fed. Appx. 329, 335 (5th Cir. 2007), the Fifth Circuit held that a district court "is not bound by the EEOC's determination of reasonable cause" and affirmed the court's summary judgment ruling. Moreover, the Court stated that "the determination is not sufficient to defeat summary judgment where the determination is not supported by the summary judgment evidence." *Id.*

In yet another case affirming a district court's granting of summary judgment, the Fifth Circuit held

that "[t]he EEOC's conclusory opinion, unsupported by any evidence in the summary judgment record, is not sufficient to defeat the motion for summary judgment." *See Wright v. Columbia Women & Children's Hosp.*, 34 Fed. Appx. 151, 155 (5th Cir. 2002). The Court stated that "this determination letter contains only the broadest legal and factual conclusions, does not identify the qualifications taken into account by the EEOC, and does not outline the nature of the investigation conducted." *Id.*

Here, the Fifth Circuit also determined that the determination letter in question, "did not create a material question of fact to defeat summary judgment" because it contained only a broad conclusion, does not "outline the nature of the investigation and does not cite evidence in support." Pet. App. at 7-8. "Because Merritt fails to present evidence that other similarly situated employees were treated more favorably," his claims were properly dismissed by the Court.

In light of Merritt's inability to establish that the lower courts' dismissal of his race discrimination claim was in conflict with the established precedent of this Court and all other Circuits, his Petition should be denied.

III. THE LOWER COURTS PROPERLY DISMISSED PETITIONER'S AGE DISCRIMINATION CLAIM.

The Fifth Circuit correctly concluded that the Petitioner "failed to provide sufficient evidence to establish a *prima facie* case of age discrimination under the ADEA. *See* Pet. App. at 10.

To establish an ADEA claim, a plaintiff must show that (1) he is a member of a protected class; (2) he was otherwise qualified for his position; (3) he was discharged from his position; and (4) he was either: (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discharged because of his age. *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005) (citing *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005)). Merritt failed to satisfy the fourth element.

In the Fifth Circuit and other circuits, it is well settled that plaintiff asserting an ADEA claim must establish that he was treated less favorably than similarly situated younger employees. *See White v. Frank,* 718 F. Supp. 592, 595 (W.D. Tex. 1989), *aff'd*, 895 F.2d 243 (5th Cir. 1990), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990).[6] This is

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[6] *See White v. Frank*, 718 F. Supp. 592, 595 (W.D. Tex. 1989), *aff'd*, 895 F.2d 243 (5th Cir. 1990), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990); *Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989), *cert. denied*,

(Continued on following page)

consistent with this Court's holding in *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). In this action, the Petitioner's evidence amounts to an assertion that he was terminated because he was seven years away from retirement and that Beattie and Chennault were younger workers. *See* Pet. at 19. The Fifth Circuit properly held that because "Beattie and Chennault were not similarly situated, Merritt does not establish a *prima facie* case of age discrimination." Pet. App. at 11.

Since the court's conclusion was based on established precedent followed by all the Circuits, the Petitioner again has failed to show a conflict with a decision of this Court or any Court of Appeals and his Petition should be denied. Moreover, Petitioner does not argue in his Petition that any conflicts exist.

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493 U.S. 850, 110 S.Ct. 147, 107 L.Ed.2d 106 (1989); *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983); *Ring v. Crisp County Hosp. Auth.*, 652 F. Supp. 477, 482 (M.D. Ga. 1987); *Dodson v. U.S. Army Fin. & Accounting Ctr.*, 636 F. Supp. 894 (S.D. Ind. 1986); *Morgan v. Humboldt County School Dist.*, 623 F. Supp 440 (D.C. Nev. 1985).

CONCLUSION

Petitioner has not established any compelling reasons for this court to grant the Petition. Therefore, Respondent respectfully request that the Petition be denied.

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